

CUSTOMARY INTERNATIONAL LAW AND THE
CHALLENGE OF CLIMATE CHANGE: HOW TO DEAL
WITH THE STAGNATION OF THE PARIS
AGREEMENT

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More than five years after the adoption of the Paris Agreement, states are struggling to implement its main provisions. In the meantime, climate disruption continues at a frenetic rhythm. This contribution examines the possible role of customary international law in the implementation of the agreement. After analyzing its inadequacy in terms of liability law, this paper examines the various avenues of international law that would make it possible to challenge the international liability of States for climate damage. Among the possibilities considered are due diligence obligations as well as erga omnes obligations. Finally, this contribution shows that the real obstacles to the achievement of the objectives of the Paris Agreement specifically, and of climate litigation more generally, are not fundamentally the inconsistency of the legal framework of the environment, but other problems inherent to international law.

I. INTRODUCTION

On December 12, 2015, the 196 members of the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Paris Agreement (the Agreement).¹ This agreement establishes the foundation for a new international legal framework to fight global climate change. The international community welcomed its adoption. The United Nations, for example, remarked its historic contribution as a successful achievement for global cooperation and multilateralism.²

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1. Conference of the Parties to the Framework Convention on Climate Change, *Rep. of the Conference of the Parties on Its Twenty-First Session*, Annex art. 13.3, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

2. See U.N. SUSTAINABLE DEV. GOALS, *COP21: un accord historique sur le climat adopté à Paris* [COP21: A Historic Climate Change Agreement Adopted in Paris] (Dec. 12, 2015), <https://www.un.org/sustainabledevelopment/fr/2015/12/12/cop21-un-accord-historique-sur-le-climat-adopte-a-paris/> (citing statements of the U.N. Secretary General and others in reaction to the Paris Agreement).

However, the Agreement has not solely elicited positive reactions. Some actors, including non-governmental organizations (NGOs), have argued that this agreement only brings empty promises and that it does not represent a real constraint for states.³ As of 2020, nearly five years after the Agreement's adoption and despite the catastrophic scenario presented by the Intergovernmental Panel on Climate Change (IPCC) in its various reports, the international community has still been unable to obtain clear commitments from states to revise their greenhouse gas reduction promises. According to its organizers, Conference of the Parties (COP25), held in 2019 in Madrid, ended with "an agreement without ambition for the planet."⁴

While some scholars believe that the Paris Agreement is a promising instrument for "modeling the future,"⁵ others wonder if such a goal is attainable.⁶ This raises the question of whether the agreement will succeed in getting states to progressively increase the ambition of their policies in relation to the climate change problem. This paper analyzes the role that customary international law plays with regard to enforcing the Paris Agreement or, in other words, whether customary international law offers pathways to address climate change and minimize its impacts. This paper argues that the problem with implementing the goals of the Paris Agreement is not so much legal, as international law has several mechanisms that could be applied to take concrete climate action, but more so political. A greater willingness on the part of all states is necessary to make the objectives set by the Agreement possible.

3. Matthieu Combe, *Les ONG analysent l'accord de la COP21* [NGOs Analyze the COP21 Agreement], *TECHNIQUE DE L'INGENIEUR* (Dec. 4, 2015), <https://www.techniques-ingenieur.fr/actualite/articles/les-ong-analysent-laccord-de-la-cop21-30664/>; Sabrina Doullens & Ana Lutzky, *Les réactions à l'adoption de l'accord de Paris sur le climat lors de la COP 21* [Reactions to the Adoption of the Paris Climate Agreement at COP 21], *BSR*, <https://www.bsr.org/fr/ourinsights/news/les-reactions-a-ladoption-de-laccord-de-paris-sur-le-climat-lors-de-la-cop>.

4. Mathieu de Taillac, *COP25 : un accord sans ambition pour la planète* [COP 25: An Agreement without Ambition for the Planet], *FIGARO* (Dec. 15, 2019), <https://www.lefigaro.fr/sciences/urgence-climatique-la-cop25-ne-parvient-pas-a-un-accord-sur-des-points-essentiels-20191215>.

5. Laurence Boisson de Chazournes, *Regards sur l'Accord de Paris – Un Accord qui Bâtit le Futur* [Insights into the Paris Agreement – An Agreement that Builds the Future] in *BILAN ET PERSPECTIVE DE L'ACCORD DE PARIS (COP21)* [ASSESSMENT AND PERSPECTIVE OF THE PARIS AGREEMENT (COP 21)] 97, 97 (Marta Torre-Schaub ed., 2017), <https://archive-ouverte.unige.ch/unige:95506>

6. E.g., Lavallée Sophie & Maljean-Dubois Sandrine, *L'Accord de Paris : fin de la crise du multilatéralisme climatique ou évolution en clair-obscur?* [The Paris Agreement: The End of the Climate Multilateralism Crisis or Evolution in Chiaroscuro?], 41 *REVUE JURIDIQUE DE L'ENVIRONNEMENT* [REV. JURID. ENV'T] 19, 33-36 (2016) (Fr.).

This paper first looks to the Paris Agreement's provisions on the international responsibility of states for wrongful acts, followed by the customary obligations of states, in particular their due diligence obligations. By virtue of this principle, states are obliged to take the necessary measures to avoid damaging other states' environments.⁷ The international community recognizes this principle, developed as early as 1941 in the *Trail Smelter Case*, as a general principle of law.⁸ The Stockholm Declaration later established environmental due diligence obligations,⁹ which developed further in the jurisprudence of the International Court of Justice (ICJ).¹⁰ This paper will then identify new possible pathways for litigation in climate matters that could make it possible to sanction breaches of the Agreement and will examine the concept of *erga omnes* obligations, which are "obligations to the international community as a whole" in whose protection all states have a "legal interest."¹¹ However, the question of whether environmental protection has *erga omnes* status will remain unanswered. Ultimately, beyond these questions, which may be the subject of competing assessments, the fact remains that international litigation, particularly when it concerns the environment, faces one major obstacle: the relativity of international justice.

7. PATRICK DAILLIER ET AL., *DROIT INTERNATIONAL PUBLIC* [PUBLIC INTERNATIONAL LAW] 1419 (8th ed. 2009).

8. Awalou Ouedrago, *La due diligence en droit international: de la règle de la neutralité au principe général* [*Due Diligence in International Law: From the Rule of Neutrality to the General Principle*], 42 U. OTTAWA REVUE GÉNÉRALE DE DROIT [REV. GEN. DR.] 641, 644 (2012).

9. See U.N. Conf. on Env't and Dev., *Report of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (Aug. 12, 1992) ("States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.").

10. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8) ("[T]he general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.").

11. *Barcelona Traction, Light and Power Company Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

II. THE PARIS AGREEMENT AND THE INTERNATIONAL CLIMATE DISPUTE: A FRAGILE LEGAL BASIS FOR QUESTIONING THE INTERNATIONAL RESPONSIBILITY OF THE STATE

In 2011, representatives at COP17 in Durban laid out the roadmap for COP21, which would take place four years later. At that meeting, representatives opened negotiations to “develop a protocol, another legal instrument or a legal outcome under the Convention applicable to all Parties.”¹² This “legal instrument” was slated for adoption in 2015 so that it would come into effect and see implementation by 2020,¹³ which was the same year of the expiry of the commitments taken by states under the Kyoto protocol.¹⁴ At COP17, however, negotiators were caught between two objectives: an ambitious agreement or a universal agreement. As some authors have recognized, it is now difficult to reconcile these two objectives.¹⁵ An ambitious and binding agreement risks gathering fewer States at the time of signature and/or ratification. For this reason, negotiators opted for a universal agreement rather than an ambitious one, in order to unite all states around a common set of rules to orchestrate collective action.¹⁶

As a result, although the Paris Agreement has broad international support,¹⁷ its legal basis is flexible. Specifically, it has neither a monitoring tool nor a punishment mechanism for violations of its provisions. Article 13.3 describes a monitoring procedure that is “non-intrusive, non-punitive in any manner, and respectful of national

12. Conference of the Parties to the Framework Convention on Climate Change, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶ 2, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011). *See also* European Parliament Press Release, COP21: Parliament’s roadmap for Paris UN climate talks, (Dec. 14, 2015) [hereinafter *Durban Platform for Enhanced Action*] (for the European Parliament, the protocol to be adopted at COP21 should “be legally binding”).

13. *Durban Platform for Enhanced Action*, *supra* note 12, ¶ 4.

14. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on December 11, 1997, set greenhouse gas emission reduction targets for developed countries only for a first commitment period from 2008 to 2012. In 2012, the members of the Kyoto Protocol adopted the Doha Amendment to extend this instrument by a second commitment period from 2013 to 2020. Rep. of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Eighth Session, Held in Doha from 26 November to 8 December 2012, ¶ 4, U.N. Doc. FCCC/KP/CMP/2012/13/Add.1, Decision 1/CMP.8 (Feb. 28, 2012).

15. Yann Aguila, *Conclusion générale*, [General conclusion] in BILAN ET PERSPECTIVE DE L’ACCORD DE PARIS (COP21), *supra* note 5, at 145, 146.

16. *Id.*

17. The Agreement enjoys the participation of 193 signatory parties. U.N. CLIMATE CHANGE, *Paris Agreement - Status of Ratification*, <https://unfccc.int/process/the-paris-agreement/status-of-ratification> (last visited Jan. 20, 2022).

sovereignty, which avoids any burden for the Parties.”¹⁸ Article 15 establishes a mechanism to facilitate the implementation of the agreement and the promotion of compliance, but it specifies that this mechanism is “non-adversarial and non-punitive.”¹⁹ Both articles clearly reflect the non-contentious nature of the Agreement’s implementation. Thus, it is a flexible agreement that sidesteps the two essential pillars of any legal system: the principles of sanction and accountability. Under these conditions, is it possible to achieve the ambitious objectives set forth in the agreement? Professor Maurice Kamto has pointed out that an agreement whose violation does not entail any responsibility lacks any practical significance.²⁰ Therefore, the Agreement’s lack of an accountability mechanism is inconducive to the achievement of its goals.

Since the provisions of the agreement do not create international responsibility for wrongful acts, and given the “transboundary” nature of international environmental law,²¹ this paper will examine the possibility of invoking its provisions in connection with the customary obligations of states, including the prohibition against causing damage to the environment of other states or to the environment beyond national jurisdiction.

III. USING CUSTOMARY INTERNATIONAL LAW TO FILL THE GAPS IN THE PARIS AGREEMENT: THE DUTY OF DUE DILIGENCE

“Water knows no frontiers” proclaimed the European Water Charter in 1968.²² Any serious pollution that affects a major river or lake can affect the entire river basin.²³ Similarly, air pollution does not stop at state borders, as evidenced, for example, by the 1986 Chernobyl accident, which continues to impact many parts of Europe.²⁴ Air pollution was the cause of one of the first environmental litigation cases in international law in the 1930s between the United States and Canada, the *Trail Smelter* case, which concerned harmful fumes from the

18. Paris Agreement, *supra* note 1, art. 13.3.

19. *Id.*, art. 15.2.

20. MAURICE KAMTO, DROIT INTERNATIONAL DE LA GOUVERNANCE [INTERNATIONAL LAW OF GOVERNANCE] 74-75 (2013).

21. DAILLIER ET AL., *supra* note 7, at 1418.

22. See Eur. Consult. Ass., *European Water Charter*, principle 12 (1968), <https://rm.coe.int/native/09000016809f12da>.

23. See *Freshwater Quality*, ENVTL. PROT. AGENCY, <https://www.epa.gov/salish-sea/freshwater-quality> (last updated June 2021) (“Poor stream water quality, for example due to contaminants, pathogens, or excess nutrients, can impact downstream rivers and marine water quality.”).

24. DAILLIER ET AL., *supra* note 7, at 1419.

Canadian Trail Smelter that blew into the United States. The famous arbitral judgement of 1941 concluded that:

under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²⁵

This sentence is the first of a long series of decisions recognizing international responsibility for transboundary environmental harms. In the *Corfu Channel* case in 1949, the International Court of Justice announced “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²⁶ The Court reaffirmed the binding force of this principle in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, by recalling that “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”²⁷

As noted by Sandrine Maljean-Dubois, this principle is a “positive obligation, a duty of due diligence.”²⁸ It obliges each state to act in such a way that hazardous activities taking place on its territory do not cause damage to the environment of other states. According to the ICJ, the obligation of due diligence is very strict:

[It] entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to [a river use agreement] would therefore be engaged if it was shown that it had failed to act diligently and thus take all

25. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938).

26. Corfu Channel (U.K. v. Alb.), Judgement, 1949 I.C.J. 4, at 22 (Apr. 9).

27. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

28. See Sandrine Maljean-Dubois, *Climate Change Litigation*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 19, <https://halshs.archives-ouvertes.fr/halshs-02281274> (last updated June 2018).

appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.²⁹

It is therefore clear that there is an obligation for states not to cause damage to the environment, as the International Law Commission (ILC) reaffirmed in its draft guidelines on the protection of the atmosphere, adopted on first reading at its seventieth session in 2021:

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation³⁰

Consequently, States should not act without considering the potential consequences of their actions on the environment of neighboring states. As a customary norm, insofar as it is binding on all states, the obligation of due diligence can engage the responsibility of a state for failing to meet its climate-related obligations. Some national jurisdictions have already begun to apply this requirement in the context of litigation initiated by actors as diverse as NGOs, individuals, cities, and foundations for the recognition of a more effective climate law.³¹ This is notably the case of French judges who, in several cases, have condemned France for not having acted sufficiently in favor of air and climate protection. In 2020, the Council of State (Conseil d'Etat) ordered the government to take measures to reduce air pollution, under a penalty of €10 million per half-year of delay.³² On August 4, 2021, the Council ruled that the measures taken by the government would not improve the situation in the shortest possible time because their

29. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶ 197 (Apr. 20). The ICJ reaffirmed this principle in 2015 in its combined judgments on *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* and *Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, 2015 I.C.J. 665, ¶ 104 (Dec. 2015)

30. Int'l Law Comm'n, Rep. on the Work of Its Seventy-Second Session, U.N. Doc. A/76/10, ¶ 39 (2021).

31. Marta Torre-Schaub, *La justice climatique en Europe: bilan et perspectives d'avenir* [*Climate Justice in Europe: Results and Future Prospects*], BLOG DROIT EUR. (Jan. 15, 2020), <https://blogdroiteuropeen.com/2020/01/15/la-justice-climatique-en-europe-bilan-et-perspectives-davenir-par-marta-torre-schaub/>.

32. Press Release, Conseil d'Etat, *Le Conseil d'État ordonne au Gouvernement de prendre des mesures pour réduire la pollution de l'air, sous astreinte de 10 M€ par semestre de retard* [The Council of State Orders the Government to Take Measures to Reduce Air Pollution, Subject to a Penalty of €10 Million per Six-Month Delay] (July 12, 2017), <https://www.conseil-etat.fr/actualites/actualites/le-conseil-d-etat-ordonne-au-gouvernement-de-prendre-des-mesures-pour-reduire-la-pollution-de-l-air-sous-astreinte-de-10-m-par-semester-de-retard>.

implementation remained uncertain and their effects unevaluated.³³ As a result, the Council implemented its threat by ordering the state to pay a fine of €10 million for the first half of 2021 to the petitioning associations involved in the fight against air pollution.³⁴ The Council also announced that it would evaluate the government's actions for the second half of 2021 at the beginning of 2022 and decide whether the state would have to pay a new penalty.³⁵ Similarly, the Administrative Court of Paris in a landmark judgment “recognized ecological damage linked to climate change and held the French state responsible for failing to fully meet its goals in reducing greenhouse gases.”³⁶

Belgium has also seen court decisions of this kind. On June 17, 2021, a court in Brussels found the Belgian federal state and three of the country's regions (Flanders, Wallonia, and Brussels) guilty of not taking the necessary measures to combat global warming.³⁷ According to the court, the four entities did not behave, in pursuing their climate policy, “as normally prudent and diligent authorities, which constitutes a fault within the meaning of Article 1382 of the Civil Code.”³⁸ In addition, the court found that “by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy,” the regions were in breach of the European Convention on Human Rights (ECHR).³⁹ And in 2018, it was Dutch judges who, in the *Urgenda* case, concluded on appeal that the state had acted unlawfully in contravention of the duty of care under Articles 2 and 8 of the ECHR by failing to pursue more ambitious emissions reductions plans by the end of 2020 and that the State needed to reduce emissions by at least twenty-five percent by that date.⁴⁰

These judicial decisions are not isolated cases. They are part of a vast worldwide movement: in Australia, Pakistan, the United States,

33. Press Release, Conseil d'Etat, pollution de l'air: le Conseil d'État condamne l'État à payer 10 millions d'euros [Air Pollution: The Council of State Condemns the State to Pay 10 Million Euros] (Aug. 4, 2021), <https://www.conseil-etat.fr/actualites/actualites/pollution-de-l-air-le-conseil-d-etat-condamne-l-etat-a-payer-10-millions-d-euros>.

34. *Id.*

35. *Id.*

36. Press Release, Paris Administrative Tribunal, L'affaire du siècle [The Case of the Century], (Feb. 3, 2021), <http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiqués-de-presse/L-affaire-du-siècle>.

37. Tribunal de Première Instance [Civ.] [Tribunal of First Instance], 4e ch. June 17, 2021, 2015/4585/A (Belg.).

38. *Id.*, at 83.

39. *Id.*

40. Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.).

Great Britain, Ireland, Norway, Austria, Switzerland, and Colombia, to name but a few, associations, foundations, and citizens, sometimes among the youngest (or among the oldest, as in Switzerland), are taking action and bringing their governments to court, sometimes obtaining injunctions to pursue more aggressive reductions of greenhouse gas emissions or to establish greener policies.⁴¹ These are quite encouraging signs that show a greater awareness of the climate issue and the mobilization of the law and judicial authorities to push states to implement the objectives of the Paris Agreement.

For such litigation, another pathway to consider is whether and to what extent environmental protection may constitute an *erga omnes* obligation that could lead to collective action of the international community against a state that fails to comply with environmental standards.

IV. THE CHALLENGE OF IMPLEMENTING RESPONSIBILITY: IS ENVIRONMENTAL PROTECTION AN *ERGA OMNES* OBLIGATION?

A second pathway that may facilitate the implementation of the Paris Agreement is a kind of public clamour or *actio popularis* for climate protection taken against any state that fails to comply with the Agreement's provisions. In principle, international law does not consider popular action. In the *South West Africa* case, for example, the ICJ stated that "although [the right at issue] may be known to certain municipal systems of law, it is not known to international law as it stands at present."⁴² Only the injured state can take legal action against those states that have committed an unlawful act and only that state can seek to engage the responsibility of the author of the wrongful act. This is the notion of "interest" and "standing."⁴³ In the *Barcelona Traction* case, the

41. See, e.g., *Leghari v. Federation of Pakistan*, (2015) W.P. No. 25501, Lahore High Court (Pak.); *Spurrier v. Secretary of State for Transport*, [2019] EWHC 1070 (Admin), [2020] PSJR 240 (U.K.) (Heathrow Airport case); *Earthlife Africa Johannesburg v. Ministry of Env'tl. Affairs*, North Gauteng High Court, No. 65662/16, (Mar. 8, 2017), <https://cer.org.za/virtual-library/judgments/high-courts/earthlife-africa-johannesburg-v-minister-of-environmental-affairs-and-others>; *Bundesgericht [BGer] [Federal Supreme Court]* May 5, 2020, 1C_37/2019 (Switz.) (*Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council*); Jillian Button et al., *Australian and Dutch courts find climate-related duties of care in Sharma and Shell*, ALLENS LINKLATERS (June 8, 2021), <https://www.allens.com.au/insights-news/insights/2021/06/australian-and-dutch-courts-find-climate-related-duties-of-care-in-sharma-and-shell/>.

42. *South West Africa Cases* (Eth. v. S. Afr., Liber. v. S. Afr.), Judgement, 1966 I.C.J. 6, ¶ 88 (July 18).

43. See CHARLES DE VISSCHER, ASPECTS RÉCENTS DU DROIT PROCÉDURAL DE LA COUR INTERNATIONALE DE JUSTICE [RECENT ASPECTS OF THE PROCEDURAL

ICJ stated that it is “the existence or absence of a right, belonging to Belgium and recognized as such by international law, which is decisive for the problem of Belgium’s capacity.”⁴⁴ In its commentary to Article 42 of the Draft Articles on State Responsibility, the ILC distinguishes between international protest and international responsibility, finding that “protest as such is not an invocation of responsibility.”⁴⁵ In general, it is not necessary for a state that wishes to protest against a breach of international law by another state to “establish any specific title or interest to do so.”⁴⁶ In contrast, “to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g., a right of action specifically conferred by a treaty, or it must be considered an injured State.”⁴⁷

However, the principle of interest recognizes one exception: *erga omnes* obligations.⁴⁸ In the *Barcelona Traction* case, the Court recognized that “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁴⁹ The Court has reaffirmed this principle in several decisions.⁵⁰ By virtue of this principle, which promotes “moral and

LAW OF THE INTERNATIONAL COURT OF JUSTICE] 62-63 (1996) (« l’intérêt est la mesure de l’action »; « pas d’intérêt, pas d’action » [“interest is the measure of action”; “no interest, no action”]).

44. *Barcelona Traction, Light and Power Company Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 36 (Feb. 5).

45. Int’l Law Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 42 cmt. 2, U.N. Doc. A/56/10, (2001) [hereinafter Draft Articles].

46. *Id.*

47. *Id.*

48. See Sandrine Maljean-Dubois, *La responsabilité internationale de l’Etat pour les dommages climatiques* [International Responsibility of the State for Climate Damage] in LES PROCÈS CLIMATIQUES : DU NATIONAL À L’INTERNATIONAL [CLIMATE TRIALS: FROM NATIONAL TO INTERNATIONAL] 1, 14 (Christel Cournil & Leandro Varison eds., 2018).

49. *Barcelona Traction, Light and Power Company Ltd. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

50. *See, e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 180 (Feb. 25) (viewing the right to self-determination as having an *erga omnes* character). *See also* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30) (describing the statement that self-determination had an *erga omnes* character as being “irreproachable”). In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*, Judgment, 2015 I.C.J. 3, ¶ 87 (Feb. 3), the Court affirmed “that the Genocide Convention contains obligations *erga omnes*” and “that the prohibition of Genocide has the character of a peremptory norm (*jus cogens*).” *See also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004

solidarity values,” every state has an interest in acting in the event of a breach of the obligation concerned.⁵¹ The ILC has also recognized this in its Draft Articles on Responsibility of States for Internationally Wrongful Acts⁵²

Is the prohibition of environmental damage an *erga omnes* norm? The expression *erga omnes*⁵³ or *peremptory norm* and even *jus cogens*⁵⁴ are not included in the Paris Agreement. On the other hand, the preamble reads as follows: “Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations”⁵⁵ In the French version, it says “Conscientes que les changements climatiques sont un sujet de préoccupation pour l’humanité tout entière [for all humanity] et que, lorsqu’elles prennent des mesures face à ces changements, les Parties devraient respecter, promouvoir et prendre en considération leurs obligations.”⁵⁶ Should this proclamation of the climate issue as a concern “for all humanity” be interpreted as an indirect recognition of the *erga omnes* nature of environmental issues?

The idea of “concern for humanity” seems to correspond to that of shared responsibility in the context of global interdependence. In this respect, Catherine Le Bris has pointed out that this implies collective action and the strengthening of the duty of cooperation.⁵⁷ From

I.C.J. 136, ¶ 155 (July 9) (recognizing the Palestinian right to self-determination as *erga omnes*).

51. PROSPER WEIL, *Le droit international en quête de son identité* [International Law in Search of Its Identity], in 237 COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 261, 290 (1992).

52. See Draft Articles, *supra* note 45, art. 48(1) (“Any State other than an injured State is entitled to invoke the responsibility of another State if [. . .] the obligation breached is owed to the international community as a whole.”).

53. According to the ILC, an *erga omnes* obligation is an obligation to the international community as a whole. It derives from peremptory norms of general international law (*jus cogens*). Int’l Law Comm’n, Peremptory Norms of General International Law (*Jus Cogens*), draft conclusion 17, Doc A/CN.4/L.936 (29 May, 2019).

54. Peremptory norm of international law and *jus cogens* are interchangeable terms. According to the ILC, “a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Id.*, draft conclusion 2.

55. Paris Agreement, *supra* note 1, pmbl., at 2.

56. *Id.* (emphasis added).

57. Catherine Le Bris, *Les changements climatiques, une « préoccupation pour l’humanité »* [Climate Change, a “Concern for Humanity”], CONVERSATION (Jan. 5, 2016, 12:46 AM), <https://theconversation.com/les-changements-climatiques-une-preoccupation-pour-lhumanite-52708>.

this notion emerges “obligations that bind every state of the international community as a whole (obligations known as “*erga omnes*”). Therefore, this notion has a special meaning in the Paris Agreement, which is universal.”⁵⁸ Similarly, professors Daillier, Forteau and Pellet have asserted that “the environment is increasingly perceived as a value common to all humankind, the preservation of which is the concern of the international community as a whole.”⁵⁹

For its part, the ILC has recognized that a state other than an injured state may invoke the responsibility of a third state if “the obligation breached is owed to the international community as a whole.”⁶⁰ In its draft guidelines and preamble on the protection of the atmosphere, provisionally adopted in 2018, the Commission recognized “that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,” but made no direct reference to the notion of *erga omnes*.⁶¹ In the more recently adopted draft guidelines, it refers to “a common concern of humankind,” echoing the language of the Paris Agreement.⁶²

Although no international body has yet explicitly recognized the environmental obligations of states as *erga omnes*, such recognition would make it easier for interested states to bring action against those states causing the most environmental harm. While customary international law and *erga omnes* norms are helpful tools to implement the Paris Agreement, the main impediment to enforcing the Agreement has so far been the question of the compulsory jurisdiction of international courts.

V. CONCLUSION: VOLUNTARISM AS AN OBSTACLE FOR THE IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LITIGATION AND THE CHALLENGE OF JURISDICTION

International law, despite dozens of treaties at both global and regional levels, has so far been unable to respond effectively to environmental damage.⁶³ Indeed, the difficulty that exists at the

58. *Id.*

59. DROIT INTERNATIONAL PUBLIC, *supra* note 3, at 1421.

60. Draft Articles, *supra* note 45, art. 48(1).

61. Int'l Law Comm'n, Fifth Rep. on the Protection of the Atmosphere, U.N. Doc. A/CN.4/711, Prml. to Annex 1 (Feb. 8, 2018).

62. Int'l Law Comm'n, Rep. on the Work of Its Seventy-Second Session, U.N. Doc. A/76/10, ¶ 39, prml. (Aug. 18, 2021).

63. Kathia Martin-Chenut, *Le rôle du droit dans la protection de l'environnement* [The Role of the Law in the Protection of the Environment], PLATFORME RSE 9 (Sept.

international level in finding a genuine international court with jurisdiction to settle inter-state disputes warrants acknowledgment. The International Court of Justice only has jurisdiction over those states which recognize its compulsory jurisdiction,⁶⁴ a condition that holds true for all universal courts apart from the World Trade Organization. This is a particularly salient issue when it comes to climate change and related disputes, since states (even those that recognize the Court's jurisdiction) are not enthusiastic in entrusting settlement to the Court.

To remedy this situation, some jurists, including Mireille Delmas-Marty, have proposed “the creation of an international environmental court with jurisdiction over both States and national companies.”⁶⁵ Failing this, the International Criminal Court (ICC) could also extend its jurisdiction to the environment as well as to bodies corporate.⁶⁶ Extending the ICC's jurisdiction may be attractive, but it does not, in view of its history, allow for optimism. In 1993, for instance, the ICJ, an ICC counterpart for civil matters, created a Special Chamber in charge of environmental issues in order to judge purely environmental cases.⁶⁷ The Chamber received no dispute submissions and in 2006, thirteen years after its creation, dissolved.⁶⁸

Additionally, any opening of the ICC's jurisdiction would require an amendment of its founding act, the Rome Statute of 1998, with the

2018), https://www.strategie.gouv.fr/sites/strategie.gouv.fr/files/atoms/files/fs-actes-role-droit-protection-environnement-14-09-2018_0.pdf.

64. Statute of the International Court of Justice art. 33.2 (San Francisco, 26 June 1945), 3 Bevans 1179, 59 Stat. 1055, T.S. No. 993, entered into force 24 Oct. 1945. *See also* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 65, at 71 (Mar. 30); Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 85 (Feb. 25) (compulsory jurisdiction means that the Court can only deal with a dispute when the States concerned have recognized its jurisdiction. No state can therefore be a party to proceedings before the Court unless it has in some manner or other consented thereto.).

65. Mireille Delmas-Marty, *Avant-propos : un pari sur l'avenir* [Foreword: A Bet on the Future], in BILAN ET PERSPECTIVE DE L'ACCORD DE PARIS (COP21), *supra* note 5, at 1, 8.

66. *Id.*

67. The Special Chamber was created pursuant to Article 26.1 of the Statute of the International Court of Justice, which states that “the Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.” Statute of the International Court of Justice, *supra* note 64, art. 26.1. *See also* Raymond Ranjeva, *L'environnement, la Cour Internationale de Justice et sa chambre spéciale pour les questions d'environnement*, 40 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [AFDI] 433 (1994).

68. Philippe Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*, 37 ENVTL. POL'Y & L. 67, 68 (2007).

agreement of state parties and would therefore require new diplomatic conferences and negotiations.⁶⁹ The success of such an undertaking is not simple, given the stakes⁷⁰ and the procedure established by the Rome Statute for its amendment. Revision is only possible if seven-eighths of the member states give their consent.⁷¹ The text also provides that any state party that has not accepted an amendment that enters into force may withdraw from the Statute with immediate effect.⁷² It is therefore not certain that recalcitrant states, indeed, the very states doing everything possible to undermine the foundations and the work of the ICC or that remain outside the Paris Agreement, would welcome such a step. Similar challenges would apply to any movement to create a new international tribunal with exclusively environmental jurisdiction.

Moreover, even if the ICC successfully broadens its jurisdiction, this may not in itself constitute a recipe for resolving the urgent issue of global warming. Indeed, like the ICJ, the ICC cannot judge government officials of states that have not ratified the Rome Statute.⁷³ This is precisely the case for the biggest polluting countries, like China, the United States, and Russia,⁷⁴ which as it stands would not be impacted by an expansion of the Court's jurisdiction. In addition, the biggest companies responsible for "two thirds of global greenhouse gas

69. Rome Statute of the International Criminal Court art. 121 (Rome, 17 July 1998), 2187 U.N.T.S. 3 [hereinafter Rome Statute].

70. Compare the comments of former Secretary General of the United Nations Boutros Boutros-Gali on the difficulties of reforming the universal organization, Boutros Boutros-Ghali, *Can the United Nations Be Reformed?*, 109 POUVOIRS, Apr. 2004, at 5-14, with the comments of French politician Hubert Védrine, Hubert Védrine, *Réflexions sur la Réforme de l'ONU* [*Reflections on the Reform of the U.N.*], 109 POUVOIRS, Apr. 2004, at 125-140.

71. Rome Statute, *supra* note 69, art. 121(4).

72. *Id.*, art. 121(6).

73. "A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5, i.e. crimes of genocide, crimes against humanity, war crimes, crimes of aggression." *Id.*, art. 12(1). A State that is not a party to the ICC Statute may nevertheless accept the jurisdiction of the Court. *Id.*, art. 12(3). In both cases, the State recognizes the jurisdiction of the Court to prosecute officials. The only exceptions to the rule of compulsory jurisdiction of the Court are cases where the crime is committed on the territory of a State Party to the Statute, *id.*, art. 12(2)(a), or where the Security Council refers the situation to the Prosecutor under Chapter VII of the U.N. Charter. *Id.*, art. 13(b).

74. COP24 : *la Chine largement en tête du top 20 des plus gros émetteurs de CO2* [COP24: *China Largely at the Top of the Top 20 Largest CO2 Emitters*], FRANCE INTER (Nov. 24, 2018, 10:47 AM), <https://www.franceinter.fr/environnement/cop24-la-chine-large-ment-en-tete-du-top-20-des-plus-gros-emetteurs-de-co2>.

emissions” are nationals of these countries.⁷⁵ Finally, the current reality of the ICC, which faces several complications when it comes to investigating or prosecuting those allegedly responsible for international crimes in certain countries, does not allow for confidence either. The dramatic decision of the Hague to abandon the investigation of war crimes committed in Afghanistan due to U.S. pressure serves as a stark reminder of the influence of external forces on the Court, even though this decision was overturned on appeal.⁷⁶ Indeed, most of the tribunal’s senior officials, including the Prosecutor, were subject to American sanctions because of their desire to investigate these alleged crimes.⁷⁷ Fortunately, the Biden administration lifted these sanctions, but their existence in the first place is another reminder of the influence of recalcitrant states in the operations of international bodies and courts.⁷⁸

In the end, it is clear that the real obstacle for achieving the objectives of the Paris Agreement and of the international climate dispute more broadly is not at its core the softness of the environmental legal framework, but rather a political issue that international law is unable to solve at its current stage of development. International law presents a variety of resources whose application could effectuate concerted action in favour of climate protections. Ultimately, the problem is political. This environmental emergency requires greater will on the part of all states, especially those that comprise the Group of Twenty, accounting for nearly eighty percent of global greenhouse gas emissions.⁷⁹

75. Olivier Bénis, *COP24 : 90 entreprises sont-elles à l'origine des deux tiers d'émissions mondiales de gaz à effet de serre ?* [COP24: Are 90 Companies Responsible for Two-Thirds of Global Greenhouse Gas Emissions?], FRANCE INTER (Nov. 30, 2018, 6:03 AM), <https://www.franceinter.fr/environnement/cop24-90-entreprises-sont-elles-a-l-origine-des-deux-tiers-d-emissions-mondiales-de-gaz-a-effet-de-serre>.

76. *Situation in the Islamic Republic of Afghanistan*, INT’L CRIM. CT., <https://www.icc-cpi.int/afghanistan> (last visited Jan. 23, 2022).

77. Press Release, Int’l Criminal Court, International Criminal Court Condemns US Economic Sanctions (Sept. 2, 2020), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1535>.

78. US Rescinds ICC Sanctions, HUMAN RIGHTS WATCH (Apr. 2, 2021, 4:26 PM), <https://www.hrw.org/news/2021/04/02/us-rescinds-icc-sanctions>.

79. See UNITED NATIONS ENV’T PROGRAMME, EMISSIONS GAP REPORT 2019, at 16 (Nov. 26, 2019), <https://www.unenvironment.org/resources/emissions-gap-report-2019>.